

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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May 13, 1996

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 96-17
Petitioner : A.C. No. 11-00877-04131
v. :
: Wabash Mine
AMAX COAL COMPANY, :
Respondent :

DECISION

Appearances: Ruben R. Chapa, Esq., Office of the Solicitor,
U.S. Dept. of Labor, Chicago, Illinois for
Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll P.C.,
Pittsburgh, Pennsylvania for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act," charging the Amax Coal Company (Amax) with two violations under the Act and proposing civil penalties of \$2,809 for those violations.

Order No. 4263998

At hearing petitioner filed a motion to approve a settlement agreement as to this order. A reduction in penalty from \$2,500 to \$2,000 was proposed. Based on the representations and documentation submitted I concluded that the proffered settlement was acceptable under the criteria set forth in Section 110(i) of the Act. That determination is here reconfirmed and an order directing payment of the penalty is incorporated herein.

Citation No. 4263995

This citation charges as follows:

"The 25/3W haulageway was not kept free of wet and muddy conditions. At No. 29 and from 10 to 12 crosscuts mud and water up to 24 inches in depth affected the control of equipment."

This citation was issued by MSHA Inspector Robert Stamm on September 5, 1995, based upon Safeguard No. 3536015 issued April 27, 1992. The safeguard had been issued pursuant to the criteria set forth in the standard at 30 C.F.R. § 75.1403-10(i). That standard provides that "[o]ff-track haulage roadways should be maintained as free as practicable from bottom irregularities, debris, and wet or muddy conditions that affect the control of equipment."

The underlying safeguard provided as follows:

"The haulage road in the Number 3 entry on the 1st S/1st W/MWS entries was not being maintained free of wet and muddy conditions that affected the control of the Gettman tractor(oil car) from spad number 35170 to 200 feet outby. This is a notice to provide safeguards requiring this roadway and other roadways at this mine to be maintained free as practical from wet or muddy conditions that affect the control of equipment."

The Secretary's general authority to issue safeguards is derived from Section 314(b) of the Act. This Commission has held that the language of that section is broad and "manifests a legislative purpose to guard against all hazards attendant upon haulage and transport [ation] in coal mining." *Jim Walter Resources, Inc.*, 7 FMSHRC 493, 496 (April 1985). The Commission has also observed that while other mandatory safety and health standards are adopted through the notice-and-comment rulemaking procedures of Section 101 of the Act, Section 314(b) extends authority to the Secretary to create on a mine-by-mine basis what are, in effect, mandatory standards, without the formalities of rulemaking. *Southern Ohio Coal Company*, 7 FMSHRC 509, 512 (April 1985). The Commission has recognized that "this unusually broad grant of regulatory authority must be bounded by a rule of interpretation more restrained than that accorded promulgated standards." *Id.*

The Commission also held in *BethEnergy Mines, Inc.*, 14 FMSHRC 17 (January 1992) that a safeguard must be based upon the specific conditions at a mine. Further, in *Southern Ohio Coal Company*, 14 FMSHRC 1 (January 1992), the Commission held that the Secretary has the burden of proving that the inspector evaluated the specific conditions at the particular mine at issue and determined that a safeguard was warranted in order to address a transportation hazard. The safeguard notice must also identify with specificity the nature of the hazard at which it was

directed and the conduct of the operator necessary to remedy such hazard.

The initial question presented in this case, therefore, is whether the instant safeguard was validly issued. I find, upon the credible testimony of the issuing inspector, that it was. According to the undisputed testimony of the issuing inspector, Wilbur Deuel, he observed on April 27, 1992, a Gettman diesel tractor which was unable to climb a hill in the mine because of "slick" conditions, described in his safeguard as wet and muddy. Deuel was concerned that the Gettman could lose control on the slick incline, which he noted was one of the steepest in the mine. This evidence adequately establishes that the inspector evaluated specific conditions at the mine in determining that this safeguard was warranted.

The identification of the nature of the cited hazard was also made in the notice to provide safeguard with the requisite specificity. It is not material to this issue that the wet and slippery conditions may have been found in a different location in the mine or on an incline. Although the wet and slippery conditions may have been aggravated by the incline, the underlying hazard was wet and slippery conditions on a haulageway. The criteria for a valid issuance of the safeguard have, therefore, been met.

The issue then, is whether Amax violated the safeguard in this case. The evidence is overwhelming that it did. According to MSHA Inspector Robert Stamm, on September 5, 1995, during the course of his inspection, he discovered standing water and mud at two locations. At crosscut No. 29 there was 30 feet of water along the 15-foot-wide entry and at the No. 15 to 20 crosscuts the body of water was 150 feet long, 15 feet wide and up to 24 inches deep. At the time he issued the citation a Gettman tractor was also stuck in the mud. Stamm noted that the hazard was from the mud itself and he observed that the Gettman tractor had been sliding toward the rib. This was evident from its tire tracks. According to Stamm, the condition should have been known to the operator as the section foreman must travel this area each day. He also observed that pumps had been installed in the area but they were not then operating. Amax representative Ray Evans told Stamm that in any event it would be difficult to pump mud with these pumps.

Stamm believed that the violation was "significant and substantial" and of high gravity because of the possibility of running into a rib and passengers being thrown around. He also observed that material falling into the water, such as cement

blocks and roof bolts, could be hit by vehicles, thereby causing accidents.

Mine examiner and United Mine Workers of America (UMWA) safety committee chairman, Joe Hoover, testified that he saw these conditions on September 5, 1995, and noted that the water extended from rib to rib. The Gettman tractor was also "hung up" with the oil and fuel cars it was pulling. Hoover noted that pickup trucks also traveled through the cited area and that he had seen such trucks drive up to 30 miles per hour. He noted that it was not uncommon for wet conditions to exist at the face areas and in the returns and primary intakes. He further observed that the cited area was a secondary escapeway and that employees passed through this area to get to the working section.

Within this framework of evidence, it is clear that the violation has been proven as charged, that the violation was "significant and substantial" and the violation was the result of negligence. A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (1984), the Commission explained:

In order to establish that a violation of a mandatory standard is significant and substantial under *National Gypsum* the Secretary must prove: (1) the underlying violation of a mandatory safety standard, (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation, (3) a reasonable likelihood that the hazard contributed to will result in an injury, and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

See also *Austin Power Co. v. Secretary*, 861, F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (1987) (approving *Mathies* criteria).

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury (*U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (1984)), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1473, 1574 (1984); see also *Halfway, Inc.*, 8 FMSHRC 8,

12 (1986) and *Southern Oil Coal Co.*, 13 FMSHRC 912, 916-17 (1991). It may reasonably be inferred from the record herein that large vehicles such as diesel tractors and pickup trucks driving through muddy, wet and slick conditions would likely skid into other equipment or vehicles, a miner or a rib thereby causing serious injuries. The operator's negligence may also be inferred from the evidence that the cited area was traveled by foremen each shift who would thereby necessarily have observed the cited violative conditions.

Under the circumstances and considering the criteria under Section 110(i) of the Act, I find that the penalty proposed by the Secretary is reasonable.

ORDER

Order No. 4263998 and Citation No. 4264052 are affirmed. Amax Coal Company is directed to pay a civil penalty of \$2,309.00 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution:

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